Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-587

PHILIP A. McLENNAN and FRED H. BENDER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN SEPENUK
1330 Bank of California Tower
707 S.W. Washington Street
Portland, Oregon 97205

LESLIE M. ROBERTS
KELL, ALTERMAN & RUNSTEIN
1330 Bank of California Tower
707 S.W. Washington Street
Portland, Oregon 97205

October 6, 1978

INDEX

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

RULES INVOLVED 2

STATEMENT OF THE CASE 3

A. Motion for New Trial 8

B. Appeal 9

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 19

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

CASES Page

Berry v. Georgia,
10 Ga. 511 (1851) 12, 15

Communist Party v. Subversive Activites Control Board,
351 U.S. 115, 76 S.Ct. 663, 100 L.Ed. 1003 (1956) 16, 17, 18

Gordon v. United States,
178 F.2d 896 (6th Cir. 1949), cert. denied, 339 U.S. 935, 70 S.Ct. 664, 94 L.Ed. 1353 (1950) 14

Larrison v. United States,
24 F.2d 82
(7th Cir. 1928)
..... 8, 9, 10, 13, 14, 15

Lindsey v. United States,
368 F.2d 633 (9th Cir. 1966), reh. denied (1967), cert. denied, 386 U.S. 1025 (1967) 12

Mesarosh v. United States,
352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1 (1956) 16, 17, 18

Newman v. United States,
238 F.2d 861 (5th Cir. 1956) 14

United States v. McLennan & Bender,
563 F.2d 943 (9th Cir. 1977), reh.denied (1977), cert. denied, 46U.S.L.W. 3649 (April 17, 1978) 4

United States v. Stofsky,
527 F.2d 237
(2nd Cir. 1975) 12, 14

Page

United States v. Wallace,
528 F.2d 863 (4th Cir. 1976) 14

FEDERAL RULES

Fed. R. Crim. Proc. 33 ..... 2, 8

Fed. R. Evid. 801(d)(1) 3, 8

STATUTES

12 U.S.C. §§ 1741 et seq (1970) 4

18 U.S.C. § 371 3

18 U.S.C. § 1001 3

18 U.S.C. § 1010 3

28 U.S.C. § 1254 2

OTHER AUTHORITIES

8A Moore's Federal Practice,
¶ 33.03 [1], 33-13 ..... 12, 14

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No._____

PHILIP A. McLENNAN and FRED H. BENDER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, Fred H. Bender and Philip A. McLennan, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on June 12, 1978, which affirmed the order of the United States District Court for the District of Oregon.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported. It is at-

tached as Appendix A, infra. The petition for rehearing and suggestion for rehearing in banc was denied September 14, 1978 (see Appendix B, infra).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

What showing must be made in a new trial motion under Rule 33 based on evidence that a government witness committed perjury at trial, where the evidence of perjury would be admissible as substantive evidence on a material issue at a new trial?

RULES INVOLVED

Rule 33 of Federal Rules of Criminal Procedure in pertinent part is as follows:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case * * *."

Rule 801(d)(1) of Federal Rules of Civil Procedure is as follows:

> "(d) Statements which are not hearsay.--A statement is not hearsay if--(1) Prior statement by witness.--The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, * * *".

STATEMENT OF THE CASE

Petitioners were convicted of making false statements to the Department of Housing and Urban Development (HUD) and of conspiring to make such statements and to defraud the United States, in violation of 18 U.S.C. §§ 371, 1001 and 1010. Some of the facts of the case were discussed in a previous appeal, reported at

563 F.2d 943 (9th Cir. 1977), reh. denied (1977), cert. denied, 46 U.S.L.W. 3649 (April 17, 1978). Petitioners were principals of non-profit corporations which financed and built college housing projects by mortgage loans from HUD under 12 U.S.C. §§ 1741, et seq (1970). The categories of expense which are eligible for HUD financing include architectural fees. The designated Project Architect on each of the relevant projects was Charles Dahlen. Accordingly, a copy of his contract for architectural services at a stated fee or fee formula was submitted to HUD for each project (so-called "A.I.A. [American Institute of Architects] standard contracts"); and subsequently, upon requisition, HUD disbursed mortgage monies for the payment of architectural fees in amounts consistent with the A.I.A. standard contracts. Over $300,000 of this amount was received by Dahlen for compensation

and expenses of himself and his office staff. Petitioners received the balance (approximately $600,000) by checks drawn on the architect's account as consulting fees. The indictment charged essentially that petitioners had overstated the cost to the corporations of architectural services. The crimes charged required specific intent. The primary defense to the charges was that petitioners lacked the specific intent to defraud or submit misleading or false statements because of their belief in the legitimacy of their receipt of funds from Dahlen, for services to Dahlen after Dahlen had become entitled to the fees in question pursuant to the A.I.A. contracts. Petitioners had a contract with Dahlen (Deft. Ex. 7) which covered consulting services. They contended that they rendered substantial services to Dahlen. These services included doing a great deal of the work which Dah-

len was to perform under the A.I.A. contracts with the corporations and for which he was to receive the stipulated fees.

Therefore, a pivotal issue was whether petitioners had indeed performed services for which they could believe they were entitled to compensation. Petitioner McLennan testified that he and his co-defendant and employees provided a substantial amount of the services called for under the A.I.A. contracts (R.809-817). Dahlen testified, to the contrary, that the petitioners provided no such services.[1]

---

1. "Q. * * * During the time that you worked at Adult Student Housing, did they perform architectural services for you?

* * *

[DAHLEN] A. No, they didn't provide what you would classify as, specifically, architectural services" (R.226). (The Clerk's transcript of record prepared for the appeal of the trial judgment will be cited as "Ct." The trial transcript will be referred to as "R." The Clerk's transcript of record prepared for the appeal of the denial of defendants' motion for new trial will be referred to as "N.T.Ct." The transcript of the hearing on the new trial will be cited as "N.T.R.".)

Subsequent to the criminal trial, and the conviction of petitioners, Dahlen was deposed in related civil litigation concerning the same matters. At that time, Dahlen volunteered a handwritten schedule (his Deposition Exhibit 3, N.T.Ct. 140-146) purporting to show the percentage of architectural services performed by petitioners and their employees in each of the college housing projects.[2] The Dahlen deposition exhibit showed that in respect to some phases of work, Dahlen computed that petitioners performed 50% to 90% of architectural services, which were services then conceded by Dahlen to have a value of at least approximately $140,000; although Dahlen had in the criminal trial

---

2. "Q. [BY MR. SEPENUK] As I understand it then, Mr. Dahlen, Exhibit #3 purports to summarize the total contribution of architectural services by the ASH principals or employees for each of the seven projects; is that correct?"

"[DAHLEN] Yes, that's correct." (N.T.Ct. 78)

testified that petitioners rendered "no" architectural services.

A. Motion for New Trial.

Petitioners moved for a new trial in the criminal case, based on newly discovered evidence, under Rule 33 of Federal Rules of Criminal Procedure. Petitioners based the motion on Dahlen's deposition testimony, contending that it established Dahlen committed perjury at the criminal trial. Furthermore, they pointed out that, under Rule 801(d)(1) of Federal Rules of Evidence, the deposition was itself admissible as substantive evidence on a new trial, if Dahlen then refused to testify to the deposition version of petitioners' rendition of architectural services.

The trial court denied the motion, resting its decision solely on its interpretation of the rule of law for review of a new trial motion, as stated in Larrison v. United States, 24 F.2d 82 (7th

Cir. 1928). The trial court held that the motion should be denied on two grounds: (1) that petitioners had failed to prove Dahlen's trial testimony to have been false, and (2) that petitioners had failed to establish that they were surprised by Dahlen's perjurious trial testimony or were unaware it was perjurious (assuming that it was so).

B. Appeal.

Petitionors appealed the trial court's Order on the grounds that (1) the Court abused its discretion in holding petitioner's proof of perjury inadequate; (2) the Court wrongly interpreted the Larrison test to require petitioners to have been surprised at trial, or unaware at trial, that perjured testimony was used against them; although only the later discovered, new evidence enabled them to prove the perjury; and (3) regardless of the resolution of points 1 and 2, the

Court erred in failing to consider or decide whether the motion required a new trial under the terms of the general test for new trials, based on newly discovered evidence, regardless of the particularized Larrison test for perjury-related motions. The Ninth Circuit (Circuit Judges Sneed, Tang and District Court Judge Ingram, sitting by designation,) affirmed without a published opinion (Appendix A, herein). The Court's Memorandum Opinion states that the only question on the appeal was whether the trial court abused its discretion in determining that Dahlen's trial testimony was not false. The Court of Appeals held there was no such abuse for the reason that the deposition testimony did not relate to architectural services.

Petitioners petitioned the Court for a rehearing, on the grounds that the Court had failed to decide appellants' second

and third point, and misstated the critical evidence. (Petitioners pointed out, inter alia, that petitioners' attorney asked Dahlen whether his deposition statement related to "architectural services"; Dahlen answered "Yes, that's correct."[3]) The Petition was denied on September 14, 1978 (Appendix B).

Petitioners' Motion for Stay of Mandate, pending submission of this petition, was granted September 25, 1978.

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari for the purpose of resolving the long standing conflict among circuits as to the standard for a new trial based on evidence of falsity by a government witness.

The general requisites for a new trial based on newly discovered evidence

---

3. N.T.Ct. 75-76, quoted, App. Br. 31, quoted App. Pet. for Reh. p. 2.

were first enunciated in Berry v. Georgia, 10 Ga. 511, 527 (1851), and are: (1) the evidence was discovered since trial; (2) failure to learn of the evidence at the time of trial was not due to lack of diligence by the defense; (3) the evidence is material to issues at trial; and (4) the evidence would probably produce acquittal in a new trial. 8A Moore's Federal Practice, ¶ 33.03 [1], 33-13, 33-14.

At present, the Second Circuit (United States v. Stofsky, 527 F.2d 237, 245-246 (2nd Cir. 1975)) holds that the same general standards apply to a motion based on evidence of perjured testimony, as apply to a motion based on any sort of new evidence.

The Ninth Circuit has applied this general standard in connection with a perjury-connected motion, e.g., Lindsey v. United States, 368 F.2d 633, 634 (9th Cir.

1966) reh. denied (1967), cert. denied, 386 U.S. 1025 (1967). (In its Memorandum Opinion here, the Circuit Court quoted the general standard as the proper test, without recognition that the lower Court had, in fact, found the divergent Larrison standard to be the applicable one).

In Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928), the Seventh Circuit adopted a different standard for the special case of motions showing perjury, as the basis for a new trial.[4] The salient characteristic of this test has generally been found in the provision that the evidence need only possibly bring

4. "* * * a new trial should be granted when, (a) The court is reasonably well satisfied that the testimony given by a material witness is false.
(b) That without it the jury might have reached a different conclusion.
(c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know if its falsity until after the trial." Larrison v U.S., 24 F.2d at 87-88 (emphasis in original)."

about acquittal upon retrial, rather than probably do so, as is required by the general test. The Larrison standard is deemed a "less stringent" standard (see, e.g., United States v. Stofsky, 527 F.2d at 245) because of the particular distastefulness of conviction based on fraud. 8A Moore's Federal Practice, § 33.06[1]. The Seventh Circuit's test has been embraced by the greater number of Circuits; United States v. Wallace, 528 F.2d 863 (4th Cir. 1976); Newman v. United States, 238 F.2d 861 (5th Cir. 1956); Gordon v. United States, 178 F.2d 896 (6th Cir. 1949) cert. denied, 339 U.S. 935 (1950).

The trial court, here, gives a new twist to the controversy by basing its order on the little-regarded language of the Larrison case requiring surprise. (The Court declined to make a factual determination whether the new evidence as substantively admissible, would either pos-

sibly or probably produce an acquittal upon retrial). Thus the Larrison test, here, was made a harsher standard than the general test, which requires no more than due diligence to uncover the new evidence (i.e., the Dahlen statement that petitioners performed substantial architectural services). The trial court failed to determine whether the Dahlen deposition, viewed as new evidence establishing the extent of petitioners' architectural services (aside from its effect to show perjury by Dahlen) would meet the general Berry v. Georgia standard. The unpublished Ninth Circuit Opinion affirmed this ruling.

The present case, therefore, presents clearly the narrow question of whether the 2nd Circuit standard, the 7th Circuit standard, the standard applied here and affirmed by the 9th Circuit, or yet a different standard, should be applied to de-

termine new trial motions based on newly discovered evidence showing perjury of a government witness. Because this is an issue of considerable importance in the administration of criminal justice in the federal courts, the Court should grant the Petition and issue a Writ of Certiorari to resolve the inter-circuit controversy.

II.

The outcome in this case is in conflict in principle with the general concerns stated by this Court in Mesarosh v. United States, 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1 (1956) and Communist Party v. Subversive Activites Control Board, 351 U.S. 115, 76 S.Ct. 663, 100 L.Ed. 1003 (1956). In Mesarosh, the Court held that the unreliability of a sometime government agent who was a witness (which unreliability was indicated by perjury in other proceedings not part of the criminal conviction in issue) required reversal if "it cannot be

determined conclusively * * * that his testimony was insignificant, in the general case against the defendants" 352 U.S. at 10-11 (emphasis added). Communist Party v. Subversive Activites Control Board was an appeal in an administrative proceeding. The Court remanded the case to the Board to determine whether certain witnesses, who had testified, had perjured themselves in other similar cases; and instructed the Board that if it so found, it should disregard their testimony.

In these cases, the witness was paid by the government in relation to his testimony. There was no prosecutorial wrongdoing alleged, but the government was involuntarily implicated by the witness's misguided responsiveness to the cause of the prosecution. This Court based its result on its supervisory powers.

Here, Dahlen was not paid by the government, but he testified under the terms

of an understanding (as stated in a letter to Dahlen by the United States District Attorney, Govt. Ex. 70) that Dahlen's own freedom from prosecution was contingent on his cooperation with the government, including testifying at trial. Further, he testified under an explicit threat of prosecution for perjury should his testimony fail to conform to earlier statements to the F.B.I. and the Grand Jury (Ct. 196-197).[5]

The grave need to guard against the possibility that the verdict can be traced to perjury, induced by prosecutorial pressures, required the result reached in Mesaroth and Communist Party. Those cases

5. In fact, Dahlen's trial testimony was even more adamant than his previous statements. In his FBI interview, Dahlen stated petitioners performed at most $50,000 worth of services (N.T.Ct. 233). Then in his subsequent Grand Jury testimony, Dahlen stated they did "a little" for him in the way of architectural help, by providing staff assistance (N.T.Ct. 227-228). Later, at trial, he said they gave "no" such service (R. 226).

point to a deeply rooted policy favoring a more lenient standard for motions based on evidence of perjury by a government witness. The trial court's order, upheld by the Ninth Circuit, raises a higher standard for such motions than the standard which is applied to motions based on other kinds of new evidence. This Court should review this case, not only to resolve the conflicting views of the various circuits on the question, but also to clarify the balance between trial finality and the appearance and actuality of trial justice, in instances of strong evidence of perjury by a government controlled witness.

CONCLUSION

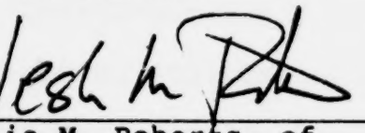
For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit

should be reversed.

Respectfully submitted,

NORMAN SEPENUK

KELL, ALTERMAN & RUNSTEIN
Leslie M. Roberts

By 
Leslie M. Roberts, of
Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, vs. PHILIP A. MCLENNAN and FRED H. BENDER, Defendants-Appellants.	)	No. 77-2181 MEMORANDUM

Appeal from the United States District Court for the District of Oregon

Before: SNEED and TANG, Circuit Judges, and INGRAM*, District Judge.

McLennan and Bender were convicted on March 3, 1976, following a jury trial, of violation of 18 U.S.C. §§ 371, 1001, 1010, making false statements in a matter within the jurisdiction of a department or agency of the United States, making false statements for the purpose of influencing the action of the Department of Housing and Urban Development (H.U.D.), and conspir-

*Honorable William A. Ingram, United States District Judge, Northern District of California, sitting by designation.

ing to make such false statements and to defraud the United States. Each defendant was sentenced to three years imprisonment, fined $50,000.00 and ordered to perform 400 hours of community service as a condition of probation. The convictions were affirmed on appeal. United States v. McLennan, 563 F.2d 943 (9th Cir.1977) cert. denied, 46 U.S.L.W. 3649 (April 17, 1978).

Defendants moved for a new trial on the basis of newly discovered evidence and the motion was denied. This is the appeal from that denial. We affirm.

Their original conviction is the result of the false statements made on the loan applications to H.U.D. The defendants formed two non-profit corporations to build seven student housing projects at various colleges and universities throughout the country. Through the corporations the defendants applied for loans from H.U.D. under the College Housing Act of 1950, 12 U.S.C. §§ 1749 et seq. (1970).

The loans were to cover project costs only. Architectural costs were limited to those costs actually "necessary" for the construction of the funded projects. The defendants represented in the loan applications to H.U.D. that the funds for the architectural costs were being paid to the project architect, Dahlen. In fact, the defendants received the money, paid Dahlen's salary and expenses, and divided the remaining money between themselves.

The sole issue before this panel is whether the trial court abused its discretion in denying the defendants' motion for a new trial. United States v. Harris, 534 F.2d 1371 (9th Cir.) cert. denied, 492 U.S. 847 (1976); United States v. Granger, 504 F.2d 585 (9th Cir. 1974).

The defendants base their motion for a new trial on alleged perjury by Dahlen resulting from a deposition given by him in a later related civil action. The deposition statement places a monetary value

of approximately $138,000.00 on services the defendants performed for Dahlen. At trial, Dahlen testified that the defendants did not provide any architectural services.

The defendants argue that the contradiction between the two statements leads to the conclusion that Dahlen perjured himself at trial and as a result of that perjury the defendants are entitled to a new trial.

In order for a motion for a new trial to succeed, the defendants must meet the following requirements:

> (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered * * *; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal. (citations omitted).

United States v. Brashier, 548 F.2d 1315,

1327 (9th Cir. 1976) cert. denied, 429 U.S. 1111 (1977).

In denying the motion, the district court was not satisfied that the trial testimony was false and even if false, the defendants were not taken by surprise and knew of the falsity at the time of trial.

The testimony of Dahlen at trial and his statement at the deposition deal with similar yet different subjects. At trial, Dahlen testified about architectural services. The deposition testimony relates to services performed in general, not necessarily services that are architectural in nature.

We are not convinced that the trial court erred in finding that the trial testimony was not false and cannot say that the denial of the motion for a new trial was an abuse of discretion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PHILIP A. MCLENNAN AND FRED H. BENDER, Defendants-Appellants.	)	No. 77-2181 ORDER

Before: SNEED AND TANG, Circuit Judges, and INGRAM*, District Judge.

The panel as constituted in the above case has voted to deny petition for rehearing. Judges Sneed and Tang have voted to reject the suggestion for rehearing en banc. Judge Ingram recommended rejection of rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

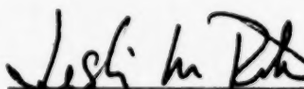
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit on the counsel for respondent by enclosing a copy thereof in an envelope, postage prepaid, addressed to:

The Hon. Wade H. McCree
Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

Mr. Sidney I. Lezak
United States Attorney
P.O. Box 71
Portland, Oregon 97207

and depositing the same in the United States mails at Portland, Oregon, on October 6, 1978, and further certify that all parties required to be served have been served.



Leslie M. Roberts
Of Attorneys for Petitioners